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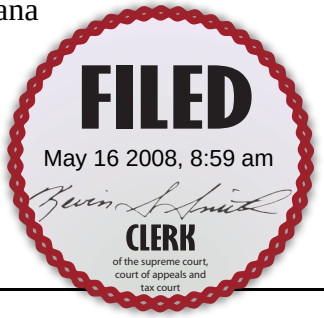

IN THE
COURT OF APPEALS OF INDIANA

THE INDIANA STATE BOARD OF NURSING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0709-CV-768
	)	
JEROME AUGUST CERNY,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0407-PL-1322

May 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The Indiana State Board of Nursing ("the Nursing Board") appeals a trial court judgment declaring unlawful the Nursing Board's summary suspension of Jerome August Cerny's nursing license and awarding Cerny damages and attorney's fees. We reverse.

Issue

The dispositive issue is whether the trial court erred in concluding that the Nursing Board's summary suspension of Cerny's nursing license constituted an unlawful deprivation of his due process rights.

Facts and Procedural History

From 1976 to 2003, Cerny was employed as a professor of psychology at Indiana State University ("ISU"). At that time, he held an Indiana license to practice psychology. He also held an Indiana license to practice nursing and worked for Clarian Health Partners as a part-time nurse.

While employed at ISU, Cerny operated a human sexuality research laboratory in which he studied male sexual responses. In the 1980s, a student notified ISU officials of allegedly inappropriate behavior by Cerny. In 1997, three students complained to ISU officials regarding Cerny's behavior. The complaints included allegations of intrusive questions regarding sexual activity, pressure to provide personal information, and inappropriate touching both inside and outside the laboratory setting. ISU officials warned Cerny that any further reports of inappropriate conduct would result in disciplinary action. In addition, they provided him with protocols directing him to refrain from the following behaviors: touching students, asking students for personal sexual information, asking his

academic advisees to participate in his sexology research studies, and being alone in the lab with any research participant.

In 2002, another student complained to ISU officials that Cerny touched his genitals and asked him detailed questions about his sexual activities. Consequently, in January 2003, ISU placed Cerny on leave, barred him from entering the campus, and ultimately forced him to retire.

In May 2003, the Indiana State Board of Psychology ("Psychology Board") summarily suspended Cerny's license to practice psychology on the grounds that he presented a clear and immediate danger to public health and safety.[1] On May 31, 2003, following notification of the Psychology Board's action against Cerny, Clarian terminated his employment as a part-time nurse.

On June 17, 2003, the State filed a petition for summary suspension of Cerny's Indiana nursing license. In its petition, the State cited the Psychology Board's action against Cerny and alleged that his continued practice of nursing would pose a clear and immediate danger to public health and safety. *See* Ind. Code § 25-1-9-10(a) (providing board may summarily suspend practitioner's license for ninety days if board finds practitioner represents clear and immediate danger to public health and safety if allowed to continue to practice.) The Nursing Board held a hearing on June 19, 2003, at which the State presented the following evidence: (1) an investigative report authored by Susan Moss, J.D., ISU's director

[1] In January 2004, following a hearing, the Psychology Board permanently revoked Cerny's license to practice psychology.

of diversity and affirmative action; (2) ISU's November 1997 memorandum to Cerny explaining the protocols he was required to follow as a result of the 1997 student complaints; and (3) ISU's January 2003 memorandum to Cerny informing him that he was being placed on leave and barred from entering the campus. The exhibits were admitted into evidence over Cerny's hearsay objections. The State also asked the Nursing Board to take judicial notice of the Psychology Board's order summarily suspending Cerny from practicing psychology. Cerny's counsel made no objection and presented no evidence.

On June 27, 2003, the Nursing Board issued a nonfinal emergency order, concluding that Cerny presented a clear and immediate danger to public safety and summarily suspending his nursing license for ninety days. Cerny then filed a petition for judicial review seeking to stay the suspensions by the Nursing and Psychology Boards, which the trial court denied on November 24, 2003. In the same order, the trial court granted the Boards' motions to dismiss Cerny's petition for judicial review.

On July 2, 2003, the State filed a complaint before the Nursing Board seeking appropriate sanctions against Cerny. A hearing was held on May 3, 2004, before a three-member administrative law judge panel ("ALJ panel"). The ALJ panel recommended that the Nursing Board place Cerny's nursing license on indefinite probation. The Nursing Board accepted the ALJ panel's recommendation and issued its final probation order on June 23, 2004.

On July 15, 2004, Cerny filed a petition for judicial review of final agency action in which he challenged not the indefinite probation but the prior summary suspension of his nursing license, claiming that the suspension was based solely on hearsay evidence and was

therefore an unlawful violation of his due process rights. On May 23, 2005, Cerny amended his petition to include a claim for damages, presumably pursuant to 42 U.S.C. § 1983, and attorney's fees pursuant to 42 U.S.C. § 1988(b).

On July 5, 2006, following a hearing on the petition, the trial court issued findings and conclusions in which it determined that the Nursing Board unlawfully based its summary suspension order solely upon hearsay. On August 8, 2007, the trial court issued a judgment awarding Cerny $20,001.00 in damages and $24,681.25 in attorney's fees. This appeal ensued.

Discussion and Decision

When we review the decision of an administrative agency, we apply the same standard as the trial court. *Dep't of Envtl. Mgmt. v. Lake County Solid Waste Mgmt. Dist.*, 847 N.E.2d 974, 983 (Ind. Ct. App. 2006), *trans. denied* (2007). We neither try the case de novo, reweigh evidentiary findings, nor substitute our judgment for that of the administrative agency. *St. Charles Tower, Inc. v. Bd. of Zoning Appeals of Evansville-Vanderburgh County*, 873 N.E.2d 598, 600 (Ind. 2007). Instead, we give "'deference to the interpretation of a statute by the administrative agency charged with its enforcement in light of its expertise in its given area.'" *Madison State Hosp. v. Ferguson*, 874 N.E.2d 615, 619 (Ind. Ct. App. 2007), *trans. denied* (2008) (quoting *State Employees' Appeals Comm'n v. Barclay*, 695 N.E.2d 957, 959-60 (Ind. Ct. App. 1998), *trans. denied*).

"When an aggrieved party … attacks the evidentiary support for the agency's findings, he bears the burden of demonstrating that the agency's conclusions are clearly erroneous." *Yater v. Hancock County Planning Comm'n*, 614 N.E.2d 568, 570 (Ind. Ct. App.

1993) (citation and internal quotation marks omitted), *trans. denied*. The agency's decision will be reversed only if it was arbitrary or capricious, was in violation of any constitutional, statutory, or legal principle, or was unsupported by substantial evidence. *Madison State Hosp.*, 874 N.E.2d at 619; Ind. Code § 4-21.5-5-14(d).[2] "A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency." *Dep't of Envtl. Mgmt*, 847 N.E.2d at 983. "We apply de novo review to questions of law, hence we owe no deference to the trial court on such inquiries." *Id*.

The Nursing Board contends that the trial court erred in concluding that it violated Cerny's due process rights in summarily suspending Cerny's nursing license. Here, the trial court concluded that the Nursing Board violated Cerny's due process rights by improperly basing its summary suspension of his license solely on hearsay evidence. "The admission of hearsay evidence is proper in an administrative hearing." *McHugh v. Review Bd. of Dep't of Workforce Dev.*, 842 N.E.2d 436, 441 (Ind. Ct. App. 2006). However, the admission of hearsay is not without limitation. *Id*. Indiana Code Section 4-21.5-3-26 provides in pertinent part,

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[2] Indiana Code Section 4-21.5-5-14 provides in pertinent part,

> (d) The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) contrary to constitutional right, power, privilege, or immunity;
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (4) without observance of procedure required by law; or
> (5) unsupported by substantial evidence.

> (a) …. The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence.[3]
>
> ….
>
> (f) Official notice may be taken of the following:
>
> (1) Any fact that could be judicially noticed in the courts.

At the June 19, 2003 hearing before the Nursing Board, the State's evidence consisted of three exhibits and the judicially noticed fact that Cerny's psychology license had been summarily suspended. The three exhibits consisted of an ISU investigative report and two memoranda from ISU to Cerny. The Nursing Board admitted these exhibits over Cerny's hearsay objections, and neither party disputes that the exhibits contain hearsay. However, the resulting order was not based solely on the exhibits.

The State requested that the Nursing Board take judicial notice of the summary suspension of Cerny's psychology license. Cerny did not object to the State's request. Appellant's App. at 38. Indiana Evidence Rule 201 provides in pertinent part,

> A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[3] In his brief, Cerny concedes that Indiana Code Section 4-21.5-4-1 authorizes special proceedings and temporary orders where an emergency exists or a statute authorizes an agency to issue a temporary order or otherwise take immediate action and that, pursuant to Indiana Code Section 4-21.5-4-2, the Nursing Board could have proceeded without even holding an evidentiary hearing. The Nursing Board argues, by negative inference, that the hearsay rule found in Indiana Code Section 4-21.5-3-26 is relaxed under Chapter 4 due to the immediacy and emergency nature of the circumstances; however, because we find that the Nursing Board's conclusion did not rest solely on hearsay, we need not address whether the hearsay rule found in Indiana Code Section 4-21.5-3-26 is inapplicable in Chapter 4 emergency proceedings.

"Judicial notice excuses the party having the burden of establishing a fact from the necessity of producing formal proof." *Brown v. Jones*, 804 N.E.2d 1197, 1201 (Ind. Ct. App. 2004), *trans. denied*.

Here, the fact not subject to reasonable dispute is that Cerny's psychology license had been summarily suspended. This fact was both generally known and capable of accurate and ready determination by resort to unquestionably accurate sources. Moreover, the record of proceedings before the Nursing Board clearly indicates that the Psychology Board found Cerny to be a danger to the public. Appellant's App. at 26; Ind. Code § 25-1-9-10(a). In his statements before the Nursing Board, Cerny's counsel alleged that the Psychology Board's action was illegal; however, although afforded an opportunity to contest or rebut the fact judicially noticed, Cerny neither objected to nor challenged the propriety of taking judicial notice at the time the State made its request. *See State Bd. of Health Facility Adm'rs v. Werner*, 846 N.E.2d 669, 672 (Ind. Ct. App. 2006) (holding failure to timely object constituted waiver of any objection to grant of requested action), *trans. denied*.

The Nursing Board had before it three hearsay exhibits plus the judicially noticed record of the summary suspension of Cerny's psychology license. As Cerny failed to object at the hearing when judicial notice was requested, the Nursing Board could fairly consider the judicially noticed fact in addition to the three hearsay exhibits.[4] Thus, the Nursing

[4] The trial court entered a finding that the Psychology Board's order cannot properly be considered as evidence because it was not issued in a different jurisdiction and was uncertified. Indiana Code Section 25-1-9-4 outlines the various bases for imposing sanctions against health professionals. Subsection (a)(7) lists as a basis that "a practitioner has had disciplinary action taken against the practitioner or the practitioner's license to practice in any state or jurisdiction on grounds similar to those under this chapter," and subsection (c) provides that "[a] certified copy of the record of disciplinary action is conclusive evidence of the other jurisdiction's disciplinary action under subsection (a)(7)." The trial court erroneously interpreted the statute.

Board's decision was not based solely on hearsay, and it did not violate Cerny's due process rights in summarily suspending his nursing license. Consequently, we reverse the trial court's judgment awarding Cerny damages and attorney's fees.[5]

Reversed.

BAILEY, J., and NAJAM, J., concur.

Although a suspension in another jurisdiction, by itself, can support disciplinary action against a health practitioner, the statute cannot be read conversely to conclude that a suspension within the same jurisdiction by a parallel administrative body is improper for consideration. Likewise, the fact that a certified record of another disciplinary action is conclusive does not conversely render an uncertified record improper for any consideration at all. Such negative inferences cannot properly be drawn. Moreover, we note that the Nursing Board's records do not indicate reliance on subsection (a)(7) as the sole basis for the summary suspension order and again note that Cerny did not make any objection before the Nursing Board when the State requested judicial notice of the Psychology Board's action against him.

[5] We note that the Nursing Board, as a state agency, may not be sued under 42 U.S.C. § 1983 regardless of the type of relief requested. *Ross v. State Bd. of Nursing*, 790 N.E.2d 110, 117 (Ind. Ct. App. 2003). Because Cerny is not a prevailing party, he is not a proper recipient of an award of attorney's fees under 42 U.S.C. § 1988(b). *Id*. at 121. Finally, because we decide this case on the merits, we need not address the State's mootness claim and therefore need not distinguish *Bowman v. State Board of Nursing*, 663 N.E.2d 1217 (Ind. Ct. App. 1996).